

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-2057

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -x

DAVID HOLLIS, :

Petitioner-Appellant :

- against - :

HAROLD J. SMITH, Superintendent, :
Attica Correctional Facility :

Respondent :

- - - - -x

On Appeal from the United States District
Court for the Eastern District of New York

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

THE SEX OFFENDER HEARING REQUIRED FOR IMPOSITION OF THE ONE-DAY-TO-LIFE SENTENCE INVOLVES THE ADJUDICATION OF A SEPARATE CRIMINAL CHARGE RATHER THAN A MERE SENTENCING ALTERNATIVE. ACCORDINGLY, THE REQUIREMENTS OF DUE PROCESS IN CRIMINAL PROSECUTIONS ARE APPLICABLE.

The essence of petitioner's argument may be summarized in one sentence: Where criminal punishment is solely authorized by a particular finding of fact, then the proceeding to adjudicate that factual question must be conducted in accordance with the constitutional requirements of due process in criminal prosecutions. This would seem to be an elementary proposition of constitutional jurisprudence and it is the basic principle announced in Specht v. Patterson, 386 U.S. 605 (1967). However, respondent seeks to obscure the issue in this case by a game of labels in which the attachment of terms such as "sentence" and "trial" and "guilt" is supposed to be outcome determinative. In so doing, respondent has made several substantial misstatements of law and fact that should be corrected.

First, although the New York Court of Appeals explicitly held in People v. Bailey, 21 N.Y.2d 588 (1968), that, for the purpose of applying Specht, the New York sex offender statute is indistinguishable from the Colorado statute considered by the Specht Court, respondent argues that the

holding in Bailey was not mandated by Specht.¹ Respondent's Brief, p. 9. However, respondent cannot re-litigate the Bailey decision in this Court. The New York Court of Appeals is the ultimate expositor of New York law and the federal courts are bound by its construction of the New York sex offender statute. Mullaney v. Wilbur, 421 U.S. 684, 690-91 (1975); Winters v. New York, 333 U.S. 507 (1948).² Furthermore, respondent improperly casts doubt on the integrity of the New York Court of Appeals by suggesting that the Court

1 It may be noted that when the Bailey case was argued, the Nassau County District Attorney's office conceded that, "No material difference exists between the Colorado statute and that of the New York legislation so this court should be guided by the rationale of Specht v. Patterson (386 U.S. 605)." 21 N.Y.2d, at 588.

2 Moreover, respondent's purported distinction between the Colorado statute and the New York statute is wholly insubstantial. Respondent argues that Specht is not applicable to the New York law because New York provides for the normal sentence and the alternative sex offender life sentence in the same statute while Colorado places the two alternative sentences in different statutes. The significance of this difference is not apparent. In any event, the respondent's Supreme Court brief in Specht points out that the Colorado Supreme Court held in Sutton v. People, 156 Colo. 201, 397 P.2d 746, 747 (1964), that the sex offender statute and the statute defining the crime "operate in pari materia as one statutory provision permitting imposition of either one or the other of alternative sentences." Respondent's Brief in Specht v. Patterson, p. 3. Thus, the Colorado Supreme Court's construction of the Colorado law eliminates this distinction.

would have construed the New York statute so as to avoid the application of Specht if it had been apparent that Specht requires greater procedural rights than were granted by the Bailey decision.

If respondent cannot re-litigate Bailey, then respondent will try to re-litigate Specht. The thrust of respondent's argument is that the hearing required prior to imposition of the one-day-to-life sentence is simply a sentencing proceeding and not the adjudication of an independent charge resulting in criminal punishment greater than the punishment authorized by the triggering conviction. But respondent's argument is directly contradicted by Specht's holding that "the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment." 386 U.S., at 610. And a reading of the Supreme Court brief for the respondent in Specht would show that the general arguments made by the respondent in the case at bar paraphrase the arguments rejected by the Specht Court.

Thus, with respect to the general due process analysis applicable to the instant case, respondent's major claim is that the Specht opinion contains a list of rights that does not include the particular procedural guarantees that the petitioner seeks in the instant case. Respondent characterizes this list of rights as the "holding" of the Specht Court. In the sense that this list of rights details the particular

relief that was granted in that case, it may be considered the "holding." As an explanation of the underlying constitutional principles that require such relief, however, this list is not, of course, the ratio decidendi of the Specht decision. The underlying principle is that criminal due process protections are required when criminal punishment is authorized by a particular fact-finding.

The reason why the particular rights sought by the petitioner herein were not mentioned in the Specht opinion is, quite simply, that those rights were not sought by the petitioner in Specht. Respondent does not accept this point, but it is apparent that respondent is not familiar with the petitioner's Supreme Court brief in Specht. In that brief, the petitioner specifically sought the right to counsel at the hearing (pp. 19, 24-25), the right to detailed or written findings to facilitate intelligent review (pp. 6, 9), and, generally, the right to a formal hearing with notice of charges, the right to hear the adverse evidence, to confront and cross-examine adverse witnesses and the right to offer evidence in rebuttal (e.g., p. 9). The brief never mentions anything about the appropriate burden of proof, the right to remain silent, the right to counsel at the psychiatric examination and the right to a jury trial.³ Thus, in de-

3 A summary of the Supreme Court briefs in Specht is reported at 18 L.Ed.2d 1470-72.

tailing the relief to be granted, the Supreme Court accorded the petitioner in Specht every procedural protection he had asked for and no others. Accordingly, respondent's argument that the Specht Court intended to deny rights that were not mentioned is untenable.

One further point may be made about the general due process principle applicable to this case. It is clear that the petitioner's lifetime incarceration in Attica Prison is criminal punishment. In the District Court, petitioner initially had a claim for relief based on the fact that he is treated exactly like all other inmates at Attica and receives little or no therapeutic treatment. That claim was withdrawn because of a failure to exhaust state remedies. However, petitioner also alleged the absence of treatment, not as a legal claim for relief, but as a factual consideration relevant to petitioner's legal claims about the denial of procedural protection in his sex offender hearing. In this context,⁴ petitioner repeatedly alleged a lack of treatment and this claim was never contested by respondent. This

⁴ In petitioner's initial memorandum of law in the District Court, it was asserted, in the argument about the procedures employed in the sex offender hearing, that the petitioner "is confined [in Attica] under exactly the same conditions as all other felony prisoners and that he receives the same treatment or, more precisely, the same lack of treatment, as all other prisoners." (Pp. 13-14 of the memorandum, reproduced at pp. A-216-17 of the Appendix). The same point was made in petitioner's reply memorandum (A-218), filed after the unexhausted claims had been withdrawn. And the same point was again made in a subsequent letter from petitioner's counsel (A-205).

point is not that important, however, because it is clear that incarceration in Attica is punitive and respondent in no way attempts to deny that fact. Moreover, respondent's brief concedes that to the extent that the one-day-to-life sentence was intended to be a program for treating sex offenders, it has been unsuccessful and that goal has been abandoned. Respondent's Brief, pp. 5-6. The significance of the fact that the petitioner is undergoing criminal punishment is that the absence of criminal due process protections at his sex offender hearing cannot be justified by a claim that he is receiving a quid pro quo in the form of treatment. Cf. Donaldson v. O'Connor, 422 U.S. 563, 585-89 (1975) (Burger, C., J., concurring).

Turning to the specific rights sought by petitioner, respondent maintains that petitioner was not entitled to remain silent and to have the assistance of counsel at the court-ordered psychiatric examination conducted prior to the sex offender hearing. Respondent exclusively relies either on cases involving indisputably civil commitments [French v. Blackburn, 428 F.Supp. 1351 (M.D. N.C. 1977); Hawks v. Lazaro, W. Va., 202 S.E.2d 109 (1974)] or on cases where the specific basis for the court's decision was that the commitment involved, despite some appearances to the contrary, was therapeutic and non-punitive. Thus, in Tippett v. State of Maryland, 436 F.2d 1153 (4th Cir. 1971), cert.

dismissed sub nom., Murel v. Baltimore City Court, 407 U.S. 355 (1972), the Court explicitly noted that "[c]ritical to the appellants' argument is the premise that, without regard to the terminology used, Patuxent is in fact a penal institution." Id., at 1156. Noting the incredibly large staff of psychiatrists, psychologists and social workers employed at Patuxent and the fact that only persons found to be defective delinquents are confined there, the Court held that the rejection of the appellant's basic contention "of necessity defeats their arguments." Id., at 1157. And in a later case, the Fourth Circuit explicitly reaffirmed that the purpose of the commitment to Patuxent is not punishment; that "it results from a civil, not a criminal proceeding." Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1367 (4th Cir. 1973).

Likewise, in the other Court of Appeals decision cited by respondent, the Court explicitly stated that certain procedural protection could be denied to persons committed under the Massachusetts sex offender law (c. 123A) because

[w]hile both c.123A and criminal proceedings may result in confinement, a person committed under c. 123A is entitled to treatment and he may not be confined with the criminal population. . . . While realistically we realize that all too often confinement of the emotionally disturbed has been little better than imprisonment, we cannot say that this must be so. Both the Massachusetts court and legislature have made considerable effort to differentiate between the treatment of the sexually dangerous, on the

one hand, and the penalizing of criminals on the other.

Gomes v. Gaughan, 471 F.2d 794, 800 (1st Cir. 1973). In contrast, petitioner's imprisonment in Attica along with a general criminal population is undoubtedly punitive. Thus, respondent's reliance on Tippett and Gomes is misplaced because In re Gault, 387 U.S. 1, 49 (1967), makes it clear that the availability of the privilege against self-incrimination depends upon the nature of the "exposure" that admission of the statement invites and exposure to punitive incarceration mandates application of the privilege.

And respondent's claim that the Specht Court approvingly cited Minnesota v. Probate Court, 309 U.S. 270 (1940), is simply incorrect. While Specht noted that the procedures employed under the Colorado statute did not even provide the protections afforded by the Minnesota statute, Specht also specifically distinguished the Minnesota v. Probate Court decision on the ground that, "The statute was not criminal in nature and was not triggered by a criminal conviction." 386 U.S., at 610 n. 3.

Finally, in addition to the cases cited in petitioner's main brief, two further cases supporting petitioner's position have been found. First, in Millard v. Harris, 406 F.2d 964, 973 (D.C. Cir. 1968), it was held that the privilege against self-incrimination is applicable in commitments under

the District of Columbia Sexual Psychopath Act. Second, in Lynch v. Baxley, 386 F.Supp. 378, 394 (M.D. Ala. 1974) (three judge court), it was held that the privilege may be invoked in civil commitment proceedings.

With respect to the right to a jury trial, respondent argues that the right is inconsistent with the Specht requirement that "there must be findings adequate to make meaningful any appeal that is allowed." Id. The petitioner's Supreme Court brief in Specht requested this procedure and relied on Kent v. United States, 383 U.S. 541 (1966) (juvenile court judge must state reasons for deciding to waive jurisdiction and send case to adult criminal court). A reading of the brief shows that this request was made because the terms used for the findings required before imposition of the life sentence under the Colorado statute - that the defendant "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill" - are somewhat vague and because there are two alternative grounds for the sentence. Thus, it is necessary for a judge to specify which ground he relies on and what exactly he has found. However, it has always been thought that where a jury is instructed as to the nature and meaning of the findings they must make, then a guilty verdict represents "findings adequate to make meaningful any appeal that is allowed."

Respondent also relies on McKeiver v. Pennsylvania, 403 U.S. 528 (1971), where the Supreme Court held that jury trials are not required in juvenile delinquency proceedings. However, that decision was explicitly premised on the Court's view that jury trials would greatly impede the idealistic, benevolent and paternalistic aspects of the juvenile court process. In the instant case, respondent has conceded that the benevolent aspects of the New York sex offender law have been unsuccessful and the petitioner is spending a life sentence in Attica. Moreover, in Humphrey v. Cady, 405 U.S. 504, 509-10 (1972), the Supreme Court stated, albeit in an equal protection context, that juries have a particularly valuable, not disruptive, role to play in sex offender proceedings.

With respect to the claim that petitioner was denied the reasonable doubt standard of proof, respondent attempts to confuse the issues regarding the fact finding procedures followed by the District Court by characterizing petitioner's argument in emotional terms. Respondent also completely ignores the main point of petitioner's argument. Petitioner's claim that improper procedures were followed is not concerned with the events leading up to the filing of the Kelly affidavit, but with what followed thereafter. It is clear that the District Court improperly denied petitioner any opportunity either to question Judge Kelly or to submit any op-

posing evidence. United States ex rel. Fox v. Maroney, 385 F.2d 839 (3d Cir. 1967), cert. denied, 392 U.S. 939 (1968). Thus, respondent's point (p. 31) that petitioner has not come forth with evidence to cast doubt on Judge Kelly's affidavit virtua amounts to a bad faith argument.

Similarly, respondent's claim (p. 30) that neither party in the state courts ever expressed a view as to the standard of proof actually applied by Judge Kelly is a clear misstatement of the record. In petitioner's brief in the Appellate Division, Second Department, it was argued that "proof of his being capable of benefitting from confinement or of his being a danger to society should have been shown beyond a reasonable doubt and not merely by a preponderance of the evidence." (A-155) (emphasis added). The Nassau County District Attorney's office did not contest the claim that the preponderance standard had been applied and by citing People v. Fuller, 24 N.Y.2d 292 (1969), they argued that preponderance was the proper standard (A-197), as respondent also argued in the District Court (A-202).

In sum, the petitioner is suffering criminal punishment based on fact-findings made in a proceeding that was inconsistent with basic criminal due process protections. Respondent never denies that this is the case, but respondent argues that this is proper by applying labels designed to

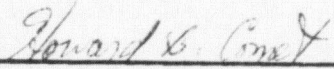
confuse rather than clarify and by making arguments that have no basis in fact.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER OF THE COURT BELOW SHOULD BE REVERSED AND THE CASE SHOULD BE REMANDED WITH DIRECTIONS TO ISSUE THE WRIT. IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING ON THE STANDARD OF PROOF USED AT PETITIONER'S SEX OFFENDER HEARING

Respectfully submitted,

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by


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DAVID HOLLIS,

:

Petitioner-Appellant:

DOCKET NO. 77-2057

- against -

:

AFFIDAVIT OF SERVICE

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

:

BY MAIL

:

Respondent

:

- - - - -x

STATE OF NEW YORK)

)

ss.:

COUNTY OF NASSAU)

LUCY MELLIADIS, being duly sworn, deposes and says,
that deponent is not a party to the action, is over 18 years of
age and resides at Jericho, New York.

That on the 14th day of October, 1977, at 5:00 p.m.
deponent served the within reply brief upon Louis J. Lefkowitz,
Attorney General of the State of New York, Two World Trade Center
New York, New York 10047, the respondent herein, by depositing
a true copy thereof in a mailbox exclusively maintained and con-
trolled by the United States Postal Service and located on Old
Country Road, Mineola, New York.

Lucy Melliadis
Lucy Melliadis

Sworn to before me this

14th day of October, 1977.

Melissa Keane

MELISSA KEANE
Notary Public, State of New York
No. 394739054

On _____ County _____
Commission Expires March 30, 1979

r,